

FILED

NOT FOR PUBLICATION

FEB 21 2006

UNITED STATES COURT OF APPEALS

**CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS**

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

PEDRO ENRIQUE DE LA GARZA,

Defendant - Appellant.

No. 05-50093

D.C. No. CR-04-00390-PA

MEMORANDUM^{*}

Appeal from the United States District Court
for the Central District of California
Percy Anderson, District Judge, Presiding

Submitted February 13, 2006^{**}

Before: FERNANDEZ, RYMER, and BYBEE, Circuit Judges.

Pedro Enrique De La Garza appeals from a judgment of conviction for being an alien found in the United States subsequent to deportation, in violation of 8

^{*} This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

^{**} This panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

U.S.C. § 1326 (a), as enhanced by (b)(2). We have jurisdiction pursuant to 28 U.S.C. § 1291.

De La Garza contends that 8 U.S.C. § 1326(b) is unconstitutional. Because De La Garza did not raise this issue before the district court, we review for plain error, *see United States v. Buckland*, 289 F.3d 558, 563 (9th Cir. 2002) (en banc), and we affirm.

De La Garza acknowledges that the Supreme Court upheld the constitutionality of 8 U.S.C. § 1326(b) in *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), but contends that subsequent decisions have undermined its vitality such that *Almendarez-Torres* is no longer good law. This argument is foreclosed by *United States v. Weiland*, 420 F.3d 1062, 1079, n.16 (9th Cir. 2005). Accordingly, we affirm the conviction.

In accordance with *United States v. Rivera-Sanchez*, 222 F.3d 1057, 1062 (9th Cir. 2000), we remand the case to the district court with instructions that it delete from the judgment the incorrect reference to § 1326(b)(2). *See United States v. Herrera-Blanco*, 232 F.3d 715, 719 (9th Cir. 2000) (remanding sua sponte to delete the reference to § 1326(b)).

AFFIRMED; REMANDED